Supreme Court, U. S.
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78-1570

IN THE

Supreme Court of the United States

October Term, 1978

NO. _____

JOHN B. HARRIS,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. _____

JOHN B. HARRIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari
To the United States Court of Appeals
for the Fourth Circuit

To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming petitioner's conviction and the judgment of the United States District Court for the Middle District of North Carolina.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Fourth Circuit appear as Appendix A to this petition, and are unpublished. The judgment of the United States District Court for the Middle District of North Carolina appears as Appendix B to this petition and is unpublished.

JURISDICTION

The decision sought to be reviewed was entered by the United States Court of Appeals for the Fourth Circuit on January 30, 1979 and denial of the petition for rehearing was entered on March 14, 1979. The opinions were not published and appear in Appendix A of this Petition. The jurisdiction of this Court to review by writ of certiorari the decision in question is conferred by Title 28, United States Code, §1254(1).

QUESTIONS PRESENTED

1. Does the prosecutorial threat, or its execution, of an additional indictment in order to coerce a change of plea by a defendant violate the due process clause of the Fifth Amendment?

Are the due process rights of an accused including the right to testify in his own behalf and the right not to be a witness against himself violated when a Federal prosecutor uses said evidence contained in the subsequent indictment in evidence at the trial of the original indictment?

2. Did the trial court err by refusing petitioner's request to instruct the jury?

(a) That the mere violation or attempted violation of a Federal Home Loan Bank Board regulation does not constitute a "willful misapplication" pursuant to 18 USC §657;

(b) That the mere making of a loan to a named borrower for the use and benefit of third party, sometimes referred to as "straw" or "accommodation" loan, does not constitute a "willful misapplication" pursuant to 18 USC §657 and that for such accommodation loan to be a "willful misapplication" there must be an additional showing that either (1) the savings and loan official authorizing the loan knew the named borrower to be a fictitious person or was wholly unaware that his name was being used, (2) that official knew the named debtor was financially incapable of repaying the loan, or (3) that official knew the savings and loan had assured the named borrower that payment would not be sought from him in the event of default.

3. Did the trial court err by refusing petitioner's request to make inquiry of any potential jurors who indicated during the voir dire process having read or heard considerable pretrial publicity, which petitioner had previously demonstrated to the trial court was substantial, inaccurate and highly prejudicial, outside the presence of the other potential jurors and thereafter, during the voir dire, allowing such jurors indicating having

read or heard considerable pretrial publicity, to recount the substance of that publicity and their conclusions therefrom in the presence of all other potential jurors.

APPLICABLE STATUTES, REGULATIONS AND CONSTITUTIONAL PROVISIONS

The statutes applicable to this petition are 18 U.S.C. §371, 656, 657 and 1006 and 12 U.S.C. §1464. The regulation applicable to this petition is 12 C.F.R. §563.9-3. The Constitutional provisions applicable to this petition are Fifth and Sixth Amendments to the United States Constitution. Said statutes, regulations and Constitutional provisions are set forth in the appendix, except 12 U.S.C. §1464.

STATEMENT OF THE CASE:

On September 6, 1976, petitioner and four other defendants were variously charged in eighteen counts of one indictment. In one count, all defendants were charged under 18 U.S.C. §371 with conspiring to commit offenses against the United States in violation of 18 U.S.C. §657 and 1006 by misapplying funds of a Federally insured savings and loan association and causing false entries and statements to be made in the records and reports of that association. Harris was also charged in thirteen substantive counts with violation of 18 U.S.C. §657 in three substantive counts with violation of 18 U.S.C. §1006, said charges all arising out of the alleged use of "accommodation borrowers" purportedly to conceal the diversion of funds to one of the defendants.

Petitioner plead not guilty to all charges on September 13, 1976. Trial was subsequently set to begin January 19, 1977.

On December 9, 1976, counsel for Harris was informed by the United States Attorney that Mr. Harris was going to be indicted on January 3, 1977 for misapplication in the MIC transaction (a transaction occurring during the period of the alleged conspiracy in this case and involving the same institution and the same set of circumstances), but Mr. Harris' counsel was informed further that if Harris would plead guilty to one count in the present indictment, the prosecutor would not go to the grand jury on the indictment in regard to MIC. Mr. Harris declined to plead guilty and on January 3, 1977, the threatened new indictment was sought and returned on MIC.

Trial in the present case commenced January 19, 1977. During the trial, the government introduced the evidence regarding the MIC transaction. The jury returned a verdict of guilty on all seventeen counts, the judgment was affirmed by the Court of Appeals and a petition for rehearing was denied.

REASONS FOR ALLOWANCE OF THE WRIT

1. The due process rights of the accused were violated by the abuse of the charging power by the prosecutor.

This Court should indicate disapproval of and bring a halt to the abuse of the

charging power of a Federal prosecutor as demonstrated in this case. Here the defendant had plead not guilty to a multi-count indictment and had requested a jury trial. A trial date had been set. In an effort to coerce the defendant to change his plea to guilty to at least one count, the prosecutor advised the defendant through counsel that if such a change of plea was not forthcoming, the defendant would be indicted on a further charge arising out of the same set of circumstances.

That the threat was real is demonstrated by the fact that the defendant refused to be coerced and was thereafter and therefor indicted.

In Bordenkircher v. Hayes, 434 U.S. 357, 54 L.Ed. 2d 604, 98 S.Ct. 663, rehden 435 U.S. 918, 55 L.Ed. 2d 511, 98 S.Ct. 1477 (1978), involving a similar question, this Court delineated two situations: one constitutionally impermissible -- one permissible. The permissible conduct was conduct:

> "... which no more than openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution, ..." 434 U.S. at 365, 54 L.Ed. 2d at 612.

In addition to limiting the permissible conduct to "this case" and "only" to the course of conduct in the presented case, this Court clearly felt it constitutionally impermissible conduct

> "... where the prosecutor without notice brought an additional and more serious charge after plea negotiations relating only to the original indictment had ended with the defendant's insistance on pleading not guilty." 434 U.S. at 360, 54 L.Ed. 2d at 609.

In the presented case, the facts do not fall within that conduct the Court accepted as "permissible" and are demonstrably more akin to that prosecutorial conduct stated to be impermissible. Clearly, the evil sought to be avoided by this Court is the evil existing in the presented case.

In the present case, plea negotiations were not continuing, the defendant had already plead not guilty and the date for the jury trial had been set. The subsequent indictment in this case arose out of the same set of transactions as the first indictment. The prosecutor put into evidence the evidence surrounding the subsequent indictment as a similar transaction at the trial in this matter. The prosecutor's conduct placed Mr. Harris in an untenable position. If he testified at his trial, he could be questioned surrounding the facts and circumstances of the case involved in the second and subsequent indictment, thus denying to Mr. Harris his right not to be a witness against himself as to the second indictment. If, because of this threat, he failed to testify, as he in fact did, he was thus forced to forego his constitutional right to testify in his own behalf in the present case.

This doubled barreled use of the charging process by a prosecutor to attempt to coerce a guilty plea in an earlier indictment and then effectively to deny a defendant his due process rights at the trial of the first indictment and at the possible trial of the second indictment are unacceptable and should be stopped.

2. (a) In holding that the trial court's jury charge was without error, the United States Court of Appeals for the Fourth Circuit rendered a decision in conflict with the decision of this Court in U.S. v. Britton, 197 U.S. 655, 2 S.Ct. 512, 27 L.Ed. 520 (1883) holding that a mere violation of banking (savings and Loan) regulation does not constitute a "willful misapplication."

Paragraph 8 of COUNT ONE of the Indictment[1] and the U. S. Attorney's opening

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[1] "8. It was a part of said conspiracy that WILLIAM W. EDWARDS, BOBBY R. ROBERTS and JOHN B. HARRIS would cause loans to be made at First Federal Savings and Loan Association, Durham, North Carolina, to various individuals and entities for the use of BOBBY R. ROBERTS for the purpose of circumventing regulations which restrict the total amount of loans to any one borrower and concealing from said Association the purpose of said loans."

statement[2] set forth the central theme of the entire Eighteen Count Indictment: that in an attempt to circumvent a regulation of the Federal Home Loan Bank Board forbidding lending to one borrower in excess of a certain percentage of the savings and loan association's

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". . . We propose to show [Roberts] was not able under federal regulations to borrow any more money from First Federal Savings and Loan; because there are regulations prohibiting a savings and loan or bank -- lending institutions -- from lending in excess of a certain amount of money to any one borrower or his corporations, because of the danger of exposing the association to lending too much to one person, putting all their eggs in one basket.

"That in order to circumvent that regulation at First Federal Savings and Loan, Mr. Roberts, along with Mr. Edwards -- who was then President -- Mr. Harris -- who was then Secretary-Treasurer and a director -- embarked on a pattern of bringing in what is known as straw borrowers.

"That loans would be made in the names of these straw borrowers, not intended for their use . . . . But loans made in their names to go to Mr. Roberts to one, circumvent the regulations prohibiting putting all the eggs in one basket, and to provide him operating capital." (Tr 170-1)

assets,[3] Petitioner made accommodation loans to various named borrowers for the benefit of a borrower otherwise forbidden to borrow more and that these transactions should be telescoped to constitute a constructive violation of that regulation.

For argument, Harris will concede that he caused the association to make the loans alleged in the indictment knowing the borrower had agreed to turn the funds over to co-defendant Bobby R. Roberts. However, from the outset of this case, Petitioner has pointed the Government to this Court's decision in U.S. v. Britton, supra, wherein this Court reversed the misapplication conviction of a bank president under 18 USC §656, the statutory twin of 18 USC §657, for purchasing stock of a bank with bank funds in violation of a federal banking regulation. In reversing that conviction, this Court labelled as mere maladministration the very activity the Government contends here constitutes a misapplication:

> "If we hold these counts to be good, then every official act of an officer, clerk or agent of a banking association, by which its funds are applied in a way not authorized by law, would be

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[3] See 12 C.F.R. §563.9-3 at Appendix p. C-11

punishable under section 5209 (now 18 U.S.C. §656).

"For instance: section 5200 of the Revised Statute declares that 'The total liabilities to any association of any person .... for money borrowed .... shall at no time exceed one tenth part of the capital stock of the association actually paid in ... If the counts under consideration are sustained, then every president, director, ... who has any part in lending money of the association contrary to the provisions of these sections, is guilty of a criminal misapplication of its funds ....

"We are, therefore, of opinion that the willful misapplication of the moneys and funds of the banking association ...., means something different from the acts of official maladministration ...." (Emphasis added) 27 L.Ed. at 524.

The wisdom of Britton was reaffirmed by the Second Circuit in U.S. v. Docherty, 468 F.2d 989 (1972) wherein that court reversed an individual's conviction for misapplication where he knowingly obtained accommodation loans for the benefit of a bank official, who by regulation was proscribed for borrowing directly from the bank. Speaking for the Court, Judge Friendly stated:

The Court also stated in U.S. v. Britton, 107 U.S. at 667, 2 S.Ct. at 522, that the counts relating

> to the stock purchase [charged] "maladministration of the affairs of the bank, rather than criminal misapplication of its funds" and that, if the counts were held to be good, "every official act of an officer, clerk or agent of a banking association, by which its funds are applied in a way not authorized by law, would be punishable ...." It would seem to follow a fortiori that mere knowledge that the transactions here at issue violated a bank rule would not suffice to support a conviction for aiding and abetting. Docherty at 993.

Accordingly, Petitioner requested the trial court specifically charge that the existence of a mere violation of a savings and loan regulation or knowledge of such violation does not constitute misapplication.[4] Instead the trial court's charge had the opposite effect:

> "A willful misapplication is an unauthorized, unjustifiable, or wrongful use of the savings and loan association's monies, funds, credits, assets, or securities ....
>
> "If you find any of the transactions involved in this case are

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[4] The entire misapplication instruction requested by Petitioner is at Appendix p. C-6

> in actual violation of specific savings and loan law, then the fact that the board of directors consented to the transaction does not constitute a defense of willful misapplication." (Transcript 2733, emphasis added)

Petitioner immediately objected to the broad and strange phraseology "savings and loan law" and the absolute criminality imposed upon the finding of "any ... actual violation of specific savings and loan law ..." Petitioner requested the trial court explain to the jury that a distinction is drawn between "laws" and "regulations" promulgated thereunder, that during the trial the government had made reference to various regulations which were not the same as law and the specific language of the more pertinent regulations discussed, and that the jury could not find willful misapplication solely upon the showing of a violation of regulation. The trial court refused these requests for additional instructions.

Under the instructions given by the trial court, a juror could easily have concluded that the showing of the violation of any regulation was a violation of a "savings and loan law" and as such constituted willful misapplication. Congress did not intend 18 USC §657 to have such a sweeping effect; instead, Congress granted the Federal Home Loan Board civil enforcement powers in 12 USC §1464 and established elaborate

administrative procedures under which those enforcement powers were to be used. By its decision in this matter, the Fourth Circuit has transferred the enforcement of the Federal Home Loan Bank regulations from the Board to the Justice Department contrary to the will of Congress. Now, as this Court feared in Britton: "every official act of an officer of a banking (or savings and loan) association, by which its funds are applied in a way not authorized by law (constitutes willful misapplication)." Britton at 27 L.Ed. at 524.

(b) In holding that the trial court's jury charge was without error, the United States Court of Appeals for the Fourth Circuit rendered a decision in conflict with decisions of the First and Third Circuit Courts of Appeal requiring a trial judge to instruct the jury that the mere making of loans to a named debtor for the use of a third party does not constitute "willful misapplication," even if this loan tended to disguise the true recipients, and that a savings and loan official authorizing a loan for such third party benefit must either (1) know the named debtor to be a fictitious person or wholly unaware that his name was being used; or (2) know the named debtor was financially incapable of repaying the loan; and (3) know the savings and loan had assured the named debtor that payment would not be sought from him in default, to constitute "willful misapplication."

Petitioner does not quarrel with the basic fact that accommodation loans were made, but has consistently argued that these accommodation loans were almost identical to those the First Circuit in U.S. v. Gens, 493 F.2d 216 (1974) concluded were perfectly permissible unless some showing that they fell within one of three proscribed categories set forth in Gens:

> "The cases of this type in which willful misapplication has been found fall into three general categories. First, those in which bank officials knew the named debtor was either fictitious or wholly unaware that his name was being used .... Second, cases in which bank officials knew the named debtor was financially incapable of repaying the loan whose proceeds he passed on to the third party .... Third, cases in which bank officials assured the named debtor, regardless of his financial capabilities, that they would look for repayment only to the third party who actually received the loan proceeds .... The three situations described ... could be characterized as 'sham' or 'dummy' loans, because there was little likelihood or expectation that the named debtor would repay. The knowing participation of [the defendant] in such loans could consequently be found to have a 'natural tendency' to injure or defraud his association and thus constitute willful misapplication within the meaning of §657 . . .

> On the other hand, where the named debtor is both financially capable and fully understands that it is his responsibility to repay, a loan to him cannot -- absent other circumstances -- properly be characterized as sham or dummy, even if [defendant] knew he would turn over the proceeds to a third party. Instead, what we really have in such a situation are two loans: one from the [association] to the named debtor, the other from the named debtor to the third party. The [association] looks to the named debtor for repayment of its loan, while the named debtor looks to the third party for repayment of his loan. If for some reason the third party fails to make repayment to the named debtor, the latter nonetheless recognizes that this failure does not end his own obligations to repay the bank. In this situation the [association] official has simply granted a loan to a financially capable party, which is precisely what an [association] official should do. There is no natural tendency to injure or defraud the bank, and the official cannot be said to have willfully misapplied funds in violation of §656." Gens at 221, 222.

The crux of this quote from Gens, is founded upon Docherty, supra, is that there must be a showing that the savings and loan official knew the accommodation maker could not or would not pay. From each named borrower called to testify, petitioner established

his reality, his awareness of making the loan and the consequences which flowed therefrom in the event of default, his financial capability, and the fact that no official of First Federal Savings and Loan, especially petitioner, had ever given the borrower any assurance that he would not be called upon for repayment if Roberts defaulted.

At the conclusion of the evidence, the petitioner and all co-defendants handed up to the Court a carefully worded Misapplication Instruction Request defining misapplication which quoted verbatim from Gens regarding what additional evidence was needed to establish the knowledge which a savings and loan official must have to convert an otherwise permissible accommodation loan into a willful misapplication. That instruction request covered seven legal sheets and was carefully tailored to the facts of this trial.[5] Instead of anything remotely similar, the trial court's only attempt to define willful misapplication in general and as it applied in this case is as follows:

> "A willful misapplication is an unauthorized, unjustifiable, or wrongful use of the savings and loan association's monies, funds, credits, assets, or securities. A willful misapplication may be accomplished by various means, such

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5 See Appendix, p. C-6

> as the making of a loan which is insufficiently secured, the making of a loan where the true recipient of the proceeds is concealed, or the making of a loan where there is no intention to repay, where the maker is insolvent. A willful misapplication may also occur where a loan is made on the strength of fraudulent applications or statements.
>
> A willful misapplication may occur when the actual recipient of the loan is willfully and knowingly concealed from the savings and loan association.
>
> However, the term "willfully misapply" means a criminal misapplication rather than a mere act of maladministration or a mere exercise of bad judgment, or in the misuse of the association's monies, funds and credits. In order for there to be a willful misapplication, the defendants must convert the association's monies, funds or credits to the use, benefit, or gain of one or more of the defendants or to some other person's or company's use, benefit or gain." (Transcript pp. 2731-2.)

At the conclusion of the charges, Petitioner entered strenuous objection and requested a more detailed explanation of what constitutes misapplication and the knowledge which the savings and loan official must have in an accommodation loan situation. However, the trial court declined to instruct further.

The trial court's instruction that: "willful misapplication may be accomplished by . . . the making of a loan where the true recipient of the proceeds is concealed ..." is almost identical to the instruction reversed in Gens:

> "... that Defendant Gens dominated and controlled Defendants Porter and Carlton or at least worked in concert with them to arrange loans to the persons named in each count in the indictment, knowing that such person were not the true borrower and that Defendant Gens was to be the true beneficiary thereof, and that each of such persons was used as the borrower either with or without the knowledge and consent of the common borrower in order to disguise the concentration of the bank's funds to Defendant Gens." Gens at 221.

In analyzing this and the other portions of the charge regarding willful misapplication, the First Circuit stated:

> [1] We think that the indictment and the charge to the jury, at best, did not give the jury adequate guidance as to precisely what acts constitute willful misapplication of bank funds in violation of §656. The most likely interpretation of the indictment and the court's charge was that appellants should be found guilty if it was found that they granted loans to the named debtors knowing that the proceeds would be turned over to Gens .... Such a finding by itself

> is not sufficient to constitute willful misapplication under §656. Therefore, the convictions cannot stand.

While Petitioner and his co-defendants were trying to convince the Fourth Circuit of the error in the trial court's charge, precisely the same issue was being argued in the Third Circuit for precisely the same reasons in U.S. v. Gallagher, 576 F.2d 1028 (1978). However, the Third Circuit came to exactly the opposite conclusion and reversed because of the defective instructions. In Gallagher the bank official had been convicted of willful misapplication for having made accommodation loans to various named parties for home improvements, the proceeds of which were turned over to a third party for business purposes proscribed by the federal banking regulations. Although the Third Circuit carefully points out that even if the named borrowers had no intention of repaying the loans, the question for the jury is not what was in the minds of the named borrower and the third party beneficiary, but what knowledge did the bank official have at the time the loans were made. In Gallagher the trial court instructed much the same as the trial court in this case:

> "The money or funds of a bank are misapplied when they are taken or appropriated or channeled, that is converted, to the use and benefit of the bank officer or employee or some third party. There is misapplication if the money or funds are diverted to an unauthorized or unjustified or wrongful use.

> The law does not treat as a misapplication the making of a bad loan, or a careless or negligent handling of money. It does not treat as a misapplication the making of a loan with poor judgment or anything of that nature.
>
> The evidence must show something more than that, because the law requires that the misapplication be done knowingly and with a specific intent to either injure or defraud a bank.
>
> In considering each of the loans involved in this case, if the evidence persuades you beyond a reasonable doubt that the bank officer or employee made the loan to an individual as a personal or consumer loan, or as a home improvement loan, and that at the time the loan was made he knew or had reason to know that the real borrower was someone else, and that the real purpose was a business rather than a personal use, then you may find that the loan was a willful misapplication of bank funds with the intent to either injure [sic] or defraud the bank." Gallagher at 1046.

In holding this instruction fatally defective, the Third Circuit approved in toto the three-category analysis of Gens and stated that the above charge was defective because of the very reason petitioner is urging this writ be granted: "the trial court failed to charge the jury that it must find that Fredenburgh

(the bank official) knew that those named as debtors lacked the ability or intent to repay the loans." (Emphasis added) Gallagher at 1046.

Likewise, the instructions of the trial court for which this writ is requested would have been reversed under the guidelines set down by the First and Third Circuit and petitioner believes those guidelines are correct and based his defense in reliance thereupon.

Since the Second Circuit discussion of the foreseeability and knowledge required to establish a "willful misapplication" in the accommodation loan situation, three other Circuits have written lengthy opinions struggling with the proper definition of "willful misapplication" to be given a jury when considering whether a bank official misapplied funds by making loans to a named borrower knowing that borrower was obtaining the funds solely for the benefit of a third party that could not obtain the loan directly: the First Circuit in Gens, the Third Circuit in U.S. v. Gallagher, 576 F.2d 1028 (1978) and the Sixth Circuit in U.S. v. Cooper, 577 F.2d 1079 (1978).

As Judge Engel so well pointed out in his opinion of June 8, 1978 in Cooper:

> ". . . the courts have had difficulty agreeing upon an adequate jury instruction covering the offense, especially with respect to the nature of the culpability required for a violation."

No more appropriate occasion could exist for the Supreme Court to correct the confusion and disagreement among the Circuits than this petition.

3. In holding that the trial judge's vior dire procedure was free from error, the Fourth Circuit Court of Appeals has denied petitioner trial by "an impartial jury" as required by the 6th Amendment to the Constitution of the United States of America.

Petitioner moved the court continue the trial because highly prejudicial and inaccurate pretrial publicity made selection of an impartial jury impossible. In support of this motion, Petitioner submitted 112 newspaper articles from the district's three newspapers of largest circulation appearing during the five months preceding and up to the date of the trial and specifically pointed out the inaccuracies and highly prejudicial accounts which caused petitioner such apprehension, e.g., reporting that Petitioner was directly involved with the immediately preceding and highly publicized trial of six other Durham businessmen in a "multi-million dollar conspiracy and fraud case" and reporting that the petitioner had already pleaded guilty, when petitioner had nothing whatsoever to do with the six businessmen tried immediately before his trial and had never indicated an intention to enter a plea of guilty.

The Trial Court acknowledged the existence of such prejudicial and inaccurate pretrial publicity, but ordered on January 19, 1977:

> "The motions for change of venue and for continuance are denied under the rationale of Wansley v. Slayton, 487 F.2d 90 (4th Cir. 1973); United States v. Jones, 542 F.2d 186, 193 (4th Cir. 1976), where it is stated that 'the proper manner for ascertaining whether ... adverse publicity may have biased ... respective jurors was through the voir dire examination (App. 53)'."

Prior to commencing voir dire, petitioner requested the Trial Court conduct specific inquiry of those jurors in the venire panel indicating considerable familiarity with the pretrial publicity individually and outside the presence of the other potential jurors in accordance with the procedure enunciated by the Fourth Circuit in Jones, (at 194):

> "We did enunciate in the United States v. Hankish (4th Cir. 1974), 502 F.2d 71, 77 and reaffirmed in United States v. Pomponio (4th Cir. 1975) 517 F.2d 460; 463 Cert. denied, 423 U.S. 1015, 96 S.Ct. 488, 46 L.Ed 2d 386 (1975), the rule that, 'when highly prejudicial information may have been exposed to the jury, the Court must ascertain the extent and effect of the infection, and thereafter, in its sound discretion, take appropriate measures to assure a fair trial.' In carrying out this duty, the Court should follow, we held, the procedure outlined in Margolis v. United States (7th Cir. 1969), 407 F.2d 727, 735 Cert. denied, 396 U.S. 833, 90 S.Ct. 89, 24 L.Ed. 2d 84 (1969). There, the Court said that inquiry should be

> made whether any jurors 'had read or heard' the prejudicial publicity and, if any had, that juror should be examined, individually and outside the presence of the other jurors, to determine the effect of the publicity." (Emphasis added)

The Trial Court refused petitioner's request and upon specific inquiry into the knowledge juror Claudius Carlton had obtained from the pretrial publicity, Carlton stated during a lengthy discussion:

> "Quite frankly, in my opinion, from what I know of the case, the burden of proof would more likely be on the defendants to prove their innocence .... I know that's not right but that's the way I feel nonetheless ... I'm just saying that I'm skeptical that the defendants will be able to counter the charges against them." (Transcript 95).

Because every juror already empanelled and the remaining venire was listening intently to these comments, defendants immediately moved for a mistrial which was denied. Thereafter, defendants again urged the Trial Court to conduct its specific voir dire examination of any juror indicating familiarity with pretrial publicity individually and outside the presence of the other jurors; however, this request went unheeded.

As the juror selection process continued, petitioner listed in disbelief as Grace D. Gray, another prospective juror, was allowed to give a detailed

description of how she and her family had read extensively and followed events as it occurred in the newspapers, how she saw this trial as a continuation of those in which others had previously pled or been found guilty, and that she thought "it would probably be difficult for me to be unbiased". (Transcript pp. 104-6).

In United States v. Perrotta, 533 F.2d 247 (1977), the First Circuit reversed a conviction under similar circumstances, stating:

> "While much discretion in dealing with incidents of this nature is vested in the trial judge, see United States v. Jones, 542 F.2d 186, 197 & n.9 (4th Cir. 1976), we agree with the Margoles court that once the court has actually determined that one or more of the jurors has been exposed to prejudicial publicity, its further investigation of the matter should be conducted on an individualized basis so that jurors will be encouraged to speak freely and will not repeat prejudicial information in one another's presence." Perrotta at 250.

The government does not contend that prejudicial pretrial publicity did not occur, it merely argues that the rationale and procedure of Jones and Perrotta are limited to prejudicial publicity occurring during the trial. Petitioner can perceive of no rational basis for such a distinction and points this Court to the inflamatory characterization given by potential jurors

Carlton and Gray. Petitioner can see no justification for saying such discussions would prejudice jurors during the trial but not before the trial and urges this court not to allow the Fourth Circuit's decision to establish such a distinction.

CONCLUSION

For the reasons set forth in this petition, we respectfully submit that certiorari should be granted.

Respectfully submitted,

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OF COUNSEL:

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Petition was served on the appellee respondent by depositing three copies in the United States mail, with postage prepaid, addressed to the Solicitor General, Department of Justice, Washington, D.C., 20530.

This the 13th day of April, 1979.

William D. Caffrey

William D. Caffrey
Counsel for Petitioner
Post Office Box 989
Greensboro, North Carolina
27402

Appendix A1

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

ROBERT D. HOLLEMAN, (77-1618),
WILLIAM W. EDWARDS, (77-1619),
JOHN B. HARRIS, (77-1620),
WILLIAM R. WINDERS, (77-1621),
BOBBY R. ROBERTS, (77-1622),

Appellants.

Appeal from the United States District Court for the Middle District of North Carolina, at Durham, Robert E. Maxwell, District Judge. (Chief Judge, United States District Court for the Northern District of West Virginia, sitting by designation.)

Argued May 4, 1978 Decided January 30, 1979

Before HAYNSWORTH, Chief Judge, RUSSELL, Circuit Judge, and FIELD, Senior Circuit Judge.

PER CURIAM:

On September 6, 1977, William W. Edwards, John B. Harris, Bobby R. Roberts,

Appendix A2

Robert D. Holleman and William R. Winders were variously charged in an eighteen count indictment returned by a grand jury for the Middle District of North Carolina. In Count One, all five defendants were charged under 18 U.S.C. §371 with a conspiracy to misapply funds of First Federal Savings and Loan Association of Durham, North Carolina, a federally insured savings and loan association, and causing false entries and statements to be made in the records and reports of the Association in violation of 18 U.S.C. §§657 and 1006. The defendants, Edwards, Harris and Roberts were charged with thirteen substantive counts of misapplication in violation of Section 657. The defendant Holleman was jointly charged in five of the misapplication counts and the defendant Winders was charged in four of those counts. Edwards and Harris were also charged with three counts of making false entries in violation of 18 U.S.C. §1006, and Holleman and Roberts were charged in Count Eighteen with a violation of Section 1006. (This count was dismissed during the course of the trial.) The jury returned verdicts of guilty as to all defendants on the conspiracy charge; found Edwards and Harris guilty of the sixteen substantive offenses; Roberts guilty of the thirteen substantive offenses; Holleman guilty of four of the substantive offenses and not guilty of one, and Winders guilty of three of the substantive offenses and not guilty of one. Convicted pursuant to the jury's verdicts, the five defendants have appealed.

Appendix A3

The charges in the indictment grew out of loan transactions of the Association covering a period of some fifteen months in the years 1973 and 1974. During all of that time William W. Edwards was the President and a director of the Association, having served as its managing officer for some eighteen years prior to the indictment. John B. Harris was Secretary-Treasurer and a director of the Association, and he and Edwards, together with a third director, served as the Association's loan committee. Holleman and Winders, both of whom were attorneys, conducted title examinations, closed loans and disbursed the proceeds thereof for the Association.

We have carefully reviewed the record and in our opinion the evidence sufficiently established that during the period covered by the indictment Edwards and Harris caused the Association to make over four million dollars in "sham" loans (See United States v. Gens, 493 F.2d 216 (1 Cir. 1974), the proceeds of which were applied to the defendant Roberts' interests, and concealed the true nature of the loans from the Association's directors as well as the examiners of the Federal Home Loan Bank by disregarding the established procedures of the Association. While the attorneys, Winder and Holleman, were not the primary actors in the conspiracy, they were willing and knowing conduits of the funds which were passed along to Roberts, and participated in the concealment of the transactions in the records of the Association.

Perceiving no error in the conduct of the trial or in the instructions of the Court, and finding the evidence sufficient to support the jury's verdicts, we affirm the convictions.

A F F I R M E D.

Appendix A5

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

ROBERT D. HOLLEMAN, (77-1618),
WILLIAM W. EDWARDS, (77-1619),
JOHN B. HARRIS, (77-1620),
WILLIAM R. WINDERS, (77-1621),
BOBBY R. ROBERTS, (77-1622),

Appellants.

Appeals from the United States District Court for the Middle District of North Carolina, at Durham. Robert E. Maxwell, Chief Judge, Northern District of West Virginia, sitting by designation.

ORDER

Upon consideration of the petition for rehearing, it is

ORDERED that the final sentence in the second paragraph on page three of the slip opinion is amended to read as

follows: "Holleman and Winders, both of whom were attorneys, conducted title examinations and disbursed the proceeds of loans for the Association." The original opinion is reaffirmed in all other respects.

NOW, THEREFORE, with the concurrence of Chief Judge Haynsworth and Judge Russell, and no judge in active service having requested a poll upon the en banc suggestion, it is ADJUDGED and ORDERED that the petition for rehearing is denied.

S/John A. Field, Jr.
Senior U.S. Circuit Judge

March 12, 1979. Filed March 14, 1979.

Appendix B1

UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION
No. Cr-76-238-D

UNITED STATES OF AMERICA,

v.

JOHN B. HARRIS,

Defendant.

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government, the defendant appeared in person on March 24, 1977 with Counsel. There being a plea of not guilty, a verdict of Guilty, as charged in Counts 1-17, defendant has been convicted as charged of the offense of conspiracy to misapply funds of a savings and loan association, the deposits of which were insured by the Federal Savings and Loan Insurance Corporation, in violation of 18 U.S.C. 371, as charged in Count 1 of an indictment; of the offense of misapplying and causing to be misapplied funds of a savings and loan association, in violation of 18 U.S.C. 657 and 2, as charged in Counts 2-14 of an indictment; and of the offense of making and causing to be made false entries on the records of a savings and loan association, in violation of 18 U.S.C. 1006, as charged in Counts 15-17 of an indictment.

The Court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years, and he is ordered to pay a fine of $10,000.00 on Count 1.

IT IS FURTHER ORDERED on Counts 2-14 that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years on each count, to run concurrently with each other and concurrently with the sentence imposed on Countl, and he is ordered to pay a fine of $3,000.00 on each count.

IT IS FURTHER ORDERED on Counts 15-17 that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years, to run concurrently with each other and concurrently with the sentence imposed on Counts 2-14 and Count 1, and he is ordered to pay a fine of $3,000.00 on each count.

S/Robert E. Maxwell
United States District Judge

March 30, 1977

18 § 371

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 § 656

Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not

more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year or both.

As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank and trust company which has become a member of one of the Federal Reserve banks; and "insured bank" includes any bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation.

18 § 657

Whoever, being an officer, agent or employee of or connected in any capacity with the Reconstruction Finance Corporation, Federal Deposit Insurance Corporation, National Credit Union Administration, Home Owners' Loan Corporation, Farm Credit Administration, Department of Housing and Urban Development, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, or any land bank, intermediate credit bank, bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States or

any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation or by the Administrator of the National Credit Union Administration or any small business investment company, and whoever, being a receiver of any such institution, or agent or employee of the receiver, embezzles, abstracts, purloins or willfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution, or pledged or otherwise intrusted to its care, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount or value embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

18 § 1006

Whoever, being an officer, agent or employee of or connected in any capacity with the Reconstruction Finance Corporation, Federal Deposit Insurance Corporation, National Credit Union Administration, Home Owners' Loan Corporation, Farm Credit Administration, Department of Housing and Urban Development, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, or any land bank, intermediate credit bank, bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corpora-

tion or association authorized or acting under the laws of the United States or any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, or by the Administrator of the National Credit Union Administration, or any small business investment company, with intent to defraud any such institution or any other company, both politic or corporate, or any individual, or to deceive any officer, auditor, examiner or agent of any such institution or of department or agency of the United States, makes any false entry in any book, report or statement of or to any such institution, or without being duly authorized, draws any order or bill of exchange, makes any acceptance, or issues, puts forth or assigns any note, debenture, bond or other obligation, or draft, bill of exchange, mortgage, judgment, or decree, or, with intent to defraud the United States or any agency thereof, or any corporation, institution, or association referred to in this section, participates or shares in or receives directly or indirectly any money, profit, property, or benefits through any transaction, loan, commission, contract, or any other act of any such corporation, institution, or association, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Amend. 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of

a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be sugject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation

Amend. 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Appendix C6

MISAPPLICATION INSTRUCTIONS

Count ___ of the indictment charges _____ with the willful misapplication of funds of First Federal Savings and Loan Association of Durham, North Carolina, by causing Loan Number _____ to be made by said Association to _____, the proceeds of which were then converted to the use of Bobby R. Roberts.

To sustain a conviction for willful misapplication of the funds of First Federal Savings and Loan Associaiton, or the aiding, abetting, or participation thereof, it is necessary that government prove the following four elements beyond a reasonable doubt: (1) that the accounts and deposits of FFSLA were insured by the Federal Savings and Loan Insurance Corporation; (2) that at the time of the alleged misapplication, _____ was an officer, agent, or employee of the FFSLA or that he aided and abetted such FFSLA representatives at such time; (3) that the defendants willfully misapplied or aided in or caused to be misapplied or aided in or caused to be misapplied the monies or funds of FFSLA; and, (4) that _____ _____ acted with the intent to defraud the institution. (Government Trial Brief).

"The term 'willfully misapplied' has generally been held to have no settled

meaning. See, e.g., U.S. v. Britton, 107 U.S. 655, 669, 2 S.Ct. 512, 27 L.Ed. 520 (1883); Mulloney v. U.S., 79 F.2d 566, 581 (1st Cir. 1935), cert. denied, 296 U.S. 658, 56 S.Ct. 383, 802 Ed. 468 (1936)... Instead, during the past hundred years it has been left to the courts to define the acts which constitute willful misapplication of [an association's] funds within the meaning of the statute. During this period several cases have involved situations roughly analogous to the instant case. [And willful misapplication of savings and loan funds has not been found in many situations wherein savings and loan officials passed proceeds of a loan to third parties.] 'The cases of this type in which willful misapplication has been found fall into three general categories. First, those in which bank officials knew the named debtor was either fictitious or wholly unaware that his name was being used... Second, cases in which bank officials knew the named debtor was financially incapable of reapying the loan whose proceeds he passed on to the third party... Third, cases in which bank officials assured the named debtor, regardless of his financial capabilities, that they would look for repayment only to the third party who actually received the loan proceeds... The three situations described...could be characterized as 'sham' or 'dummy' loans, because there was little likelihood or expectation that the named debtor would repay. The knowing participation of _____ in such loans could consequently be found to have a

'natural tendency' to injure or defraud his association and thus constitute willful misapplication within the meaning of §657... On the other hand, where the named debtor is both financially capable and fully understands that it is his responsibility to repay, a loan to him cannot - absent other circumstances - properly be characterized as sham or dummy, even if [_____[knew he would turn over the proceeds to a third party. Instead, what we really have in such a situation are two loans: one from the [association] to the named debtor, the other from the named debtor to the third party. The [association] looks to the named debtor for repayment of its loan, while the named debtor looks to the third party for repayment of his loan. If for some reason the third party fails to make repayment to the named debror, the latter nonetheless recognizes that this failure does not end his own obligation to repay the bank. In this situation the [association] official has simply granted a loan to a financially capable party, which is precisely what an [association] official should do. There is no natural tendency to injure or defraud the bank, and the official cannot be said to have willfully misapplied funds in violation of §657." U.S. v. Gens, 493 F.2d 216, 222 (1974).

Unless, ladies and gentlemen of the jury, you find either _____ knew _____ to be a fictitious person or wholly unaware that

his name was being used; or _____ knew _____ was financially incapable of repaying the loan; or _____ had assured _____ that payment would not be sought from him in default, then you cannot convict _____ of willful misapplication for this reason.

In determining whether an individual is "financially capable" you must consider (1) the existing and potential developed value of the property used as security; (2) the total assets of the named borrower; and, (3) the future earning capacity of the named borrower. All three combine to establish "financial capability". In addition, if you find that this loan was an accommodation loan as I have just described, you may consider the financial capability of the third party.

The last element requires proof that _____ acted with the intent to defraud First Federal Savings and Loan Association. Even though you believe that _____ misapplied the funds of the association, you must acquit him if the government has not convinced you with evidence beyond a reasonable doubt that he acted with that level of criminal intent which I will now explain. The level of intent required by the statute is the specific intent to defraud or injure the association. U.S. v. Arthur, case #74-2276, decided Nov. 11, 1976, at 15 (4th Cir. 1976). To "defraud"

the association necessarily requires evidence that _____ received some specific benefit or advantage and that a corresponding injury is inflicted on the association. U.S. v. Lee, 12 F 816, at 819 (2nd Cir. 1882). The word "injure" is used to designate pecuniary or financial loss to the association. U.S. v. Arthur, supra. To find _____ guilty, you must find from the evidence beyond a reasonable doubt that he acted with one of these specific intents -- the intent to defraud the association, thereby injuring it and benefiting himself, or the intent to injure the association financially.

Since it is difficult to know the intent of an individual, intent may be proved by circumstantial evidence. Breese v. U.S., 106 F 680, 687 (4th Cir. 1901). Hyde v. U.S., 15 F 2D 816, 822 (4th Cir. 1926). One factor of circumstantial evidence is the acts themselves. It is reasonable to infer that a person ordinarily intends the natural and probable consequences of his acts. The jury may draw the inference that the accused intended all of the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any intentional act. U.S. v. Arthur, supra at 16. Therefore, the jury may also consider the results of Mr. Edwards' acts, including whether or not the association suffered a loss and whether or not such loss should have been, at the time of

defendant's acts, reasonably foreseen as a natural and probable effect of these acts. U.S. v. Kenney, 90 F 257, 267 (3rd Cir. 1898) and U.S. v. Laws, 66 F 2d 870, at 871 (10th Cir. 1933).

It is now proper to call your attention to several administrative regulations published by the Federal Home Loan Bank Board. These regulations I now quote have been referred to by both the government and the defense. I will now read you the actual wording of those regulations which you shall accept as accurate:

12 CFR

§563.9-3. Loans to one borrower. (a) Definition of terms. For the purposes of this section the term "one borrower" means (1) any person or entity that is, or that upon the making of a loan will become, obligor on a loan, (2) nominees of such obligor, (3) all person, trusts, partnerships, syndicates, and corporations of which said obligor is a nominee or a beneficiary, partner, member, or record or beneficial stockholder owning 10 percent or more of the capital stock, and (4) if such obligor is a trust, partnership, syndicate, or corporation, all trusts, partnerships, syndicates, and corporations of which any beneficiary, partner, member, or record or beneficial stockholder owning 10 percent or more of the capital stock or such

obligor; and the term "total balances of all outstanding loans" means the original amounts loaned by an insured institution plus any additional advances and interest due and unpaid, less repayments and participating interests sold and exclusive of any loan on the security of real estate the title to which has been conveyed to a bona fide purchaser of such real estate.

(b) Limitations. No insured institution shall have outstanding any loan to one borrower, as defined in paragraph (a) of this section, if the sum of (1) the amount of such loan and (2) the total balances of all outstanding loans owed to such institution and its service corporation affiliates by such borrower exceeds an amount equal to 10 percent of such institution's withdrawable accounts or an amount equal to such institution's net worth, whichever amount is less.....

12 CFR §563.17(c)

(1) Records with respect to loans on the security of real estate. The records of an insured institution with respect to each loan which such institution makes on the security of real estate shall include: ...

(vi) Documentation showing the date, amount, purpose and recipient of every disbursement of the proceeds

of such loan, whether such disbursements are made directly by such institution or through escrows or other persons or concerns: . . . .

12 CFR

§545.6-14 Loans to finance acquisition and development of land....

(c) Loans to finance acquisition and development of land. No loan shall be made under this paragraph in an amount equal to more than 75 percent of the value of the real estate security therefor as of the completion of the development thereof into building lots or sites ready for construction thereon. Each loan shall be repayable within a period of not more than 5 years and the interest thereon shall be payable at least semi-annually. No disbursement of any of the proceeds of any loan made under this paragraph shall be made at any time if such disbursement, together with the aggregate amount of such proceeds previously disbursed by the association and not repaid to it, would exceed an amount equal to 75 percent of the value at such time of (1) that portion of the security property which is building lots or sites the development of which is in progress or completed and (2) the remaining security property.

From direct and cross-examination you are certainly aware that the government contends one or more of these regulations

was violated and the defense contends none were violated. However, you should be aware that a mere violation or attempted violation of these regulations is not criminal misapplication. Such a violation is neither a felony nor a misdemeanor. Even if you find there was an agreement to violate these regulations, it would not constitute criminal misapplication. Further, if you determine a violation has occurred, these unauthorized or illegal acts are not criminal acts. You must distinguish between the maladministration of the affairs of a savings and loan association and criminal misapplication of the funds. U.S. v. Britton, supra at 525. Now, some of the possible remedies provided for such wrongful expenditures or unauthorized use of funds by the savings and loan statutes and regulations are: the association's loss of federal insurance, removal of responsible directors, or the liability of those directors for any damages sustained by the association or its shareholders. But such acts are not criminal offenses. U.S. v. Harper, 33 F 471, at 478 (6th Cir. 1887).

Therefore, whether or not _____ caused the association to violate the before read regulations should be considered as only one of the factors determining _____ intent. There are other factors which bear on his intent which you may consider and give either equal, greater or lesser weight.

-- _____ own personal financial interest in the welfare

of First Federal Savings and Loan. U.S. v. Laws, supra at 827, footnote 2.

-- _____ and First Federal's previous 20 years of dealing with Mr. Roberts and his associates.

-- _____ and First Federal's previous dealings with each named borrower.

-- The economic factors operating within the Durham and to some extent the state or national savings and loan industry during the years 1972, 1973, and 1974.

-- The potential profitability of each loan under consideration.

-- The divergence of opinions interpreting the before cited regulations between the Federal Home Loan Bank Examiners.

-- The similarity or divergence of the loan procedures here used and those used by First Federal on other loans.

The last factor I will mention -- and I do not mean to indicate that there could not be other factors which might reflect on _____ intent -- is his reputation -- not because it entitles him to special treatment but because it may reasonably be related to

whether or not the defendant acted with the required intent. The evidence of the good character of the defendant ought to be given great weight by the jury. In resolving any doubt which the jury may have as to the criminal knowledge or intention of the defendant, the uncontradicted proof of his former good character for honesty and integrity should have great weight, and be allowed to settle that doubt in his favor. Breese v. U.S., supra, at 820.

I remind you that the intent to defraud or injure the association is an essential element of the offense charged, and if you entertain a reasonable doubt as to the defendant's intent to defraud or injure the association, you should acquit the defendant of those counts charging willful misapplication. Furthermore, if you find that some of the transactions involved are susceptible to different interpretations or inferences, you must adopt the inference favorable to the accused. Hyde v. U.S., supra, at 820. In other words, if you can reconcile the evidence with any reasonable hypothesis consistent with the innocence of the accused, it is your duty to do so, and in that case the verdict should be "Not Guilty." Breese v. U.S., supra, at 687 U.S. v. Lee, supra, at 820.

see

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